APPEAL NO. 022289
FILED OCTOBER 16, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on August 7, 2002. With respect to the issues before her, the hearing officer determined that the respondent (claimant) did not sustain a compensable injury on (alleged date of injury); that the claimant did not timely report his alleged injury in accordance with Section 409.001, thus, the respondent (self-insured) is relieved of liability under Section 409.002; that the self-insured did not waive its right to contest compensability under Section 409.021; and that the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage as a result of his back injury from February 8 to March 1, 2001. In his appeal, the claimant asserts error in the hearing officer's determination that the self-insured did not waive its right to contest compensability under Section 409.021. In its response to the claimant's appeal, the self-insured urges affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The hearing officer did not err in determining that the self-insured received its first written notice of the _____, work-related injury on November 26, 2001. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. As the fact finder, the hearing officer resolves the conflicts and inconsistencies in the evidence and determines what facts the evidence has established. Garza v. Commercial Ins. Co., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). There was conflicting evidence on the issue of when the self-insured received its first written notice of the claimed injury. The hearing officer resolved those conflicts and inconsistencies against the claimant and she was acting within her province as the fact finder in so doing. Nothing in our review of the record demonstrates that the challenged determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb the determination that the self-insured received its first written notice of the claimed injury on November 26, 2001, on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Having affirmed that the self-insured received its first written notice of the claimed injury on November 26, 2001, and noting the self-insured filed its contest of compensability on December 18, 2001, that contest was not timely under Section 409.021(a). On August 30, 2002, the Texas Supreme Court denied the carrier's motion for rehearing in Continental Cas. Co. v. Downs, Case No. 00-1309, decided June 6, 2002, and, as such, the Downs decision, along with the requirement to adhere to the seven-day "pay or dispute" provision, is final. Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002; *see also* TWCC

Advisory 2002-15 (September 12, 2002). In this case, the December 18, 2001, contest of compensability was filed more than seven days after November 26, 2001, and there was no evidence that the self-insured initiated benefits within seven days of November 26, 2001. Thus, the determination that the carrier did not waive its right to contest compensability under Section 409.021 is reversed and a new decision rendered that the self-insured waived its right to contest compensability. Given that the self-insured did not comply with the requirements of Section 409.021(a) by either initiating benefits or filing a notice of refusal, it has lost its right to contest compensability, which includes its right to assert a defense under Section 409.002 based upon the claimant's failure to give timely notice of her injury to her employer. Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002. Accordingly, we reverse the determination that the self-insured is relieved of liability under Section 409.002 and render a new determination that the self-insured is not relieved of liability for benefits. Finally, we note that the hearing officer determined in Finding of Fact No. 5 that the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage as a result of his back injury from February 8 to March 1, 2001; thus, we render a determination that the claimant had disability from February 8 to March 1, 2001.

The determination that the self-insured received its first written notice of the claimed injury on November 26, 2001, is affirmed. The hearing officer's determination that the self-insured did not waive its right to contest compensability is reversed and a new decision rendered that the self-insured waived its right to contest compensability, which included its right to assert a defense under Section 409.002. Thus, the self-insured is not relieved of liability for benefits. The self-insured is ordered to pay medical and income benefits in accordance with this decision. Accrued and unpaid benefits are to be paid in a lump sum with interest.

The true corporate name of the self-insured is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

CITY SECRETARY
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge